

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HELEN ZIMMONS,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 268493

Oakland Circuit Court

LC No. 2005-205036-FH

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree child abuse, MCL 750.136b(5), and sentenced to one year of probation. Defendant appeals as of right. We affirm.

First, defendant argues that the circuit court erred when it ordered the reinstatement of the charge against her after the magistrate properly dismissed the charge at the preliminary examination. We disagree.

If the magistrate at a preliminary examination determines that probable cause exists to believe both that an offense has been committed and that the defendant committed it, the defendant must be bound over for trial. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998); MCR 6.110(E). Some evidence must be presented regarding each element of the crime or from which those elements may be inferred. *Goecke, supra*. At the conclusion of the preliminary examination when the magistrate considers the request to bind over the defendant, the prosecution need not prove beyond a reasonable doubt that the defendant committed the crime charged. *People v Greene*, 255 Mich App 426, 443; 661 NW2d 616 (2003); see also MCL 766.13. The threshold for the evidence necessary to bind over a defendant for trial is much lower than the evidence needed to convict a defendant of the crime at trial. *Greene, supra* at 443-444. If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the fact-finder at trial resolve those questions of fact. *Id.* at 444. This requires binding the defendant over for trial. *Id.* The magistrate may not weigh the evidence to determine the likelihood of conviction, but must restrict his or her attention to whether there is evidence regarding each of the elements of the offense, after examining the whole matter. *Id.*

Pursuant to MCL 750.136b(5), “[a] person is guilty of child abuse in the third[-]degree if the person knowingly or intentionally¹ causes physical harm to a child.” (Footnote added.) “‘Physical harm’ means any injury to a child’s physical condition.” MCL 750.136b(1)(e). The child abuse statute recognizes an exception for when a parent/guardian disciplines a child, providing, “[t]his section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.” MCL 750.136b(7).

Evidence adduced at the preliminary examination established that defendant used a belt to “whoop” her five year old granddaughter,² the victim, five or six times on the victim’s back because the victim was misbehaving. The whooping left red marks and bruises from a few inches below the victim’s neck to her waistline. The marks were revealed at school the next day when the victim complained to a teacher that she could not sit in a chair or participate in gym activities because her back hurt. Defendant remarked to the social worker assigned to the case that she may have whooped the victim too hard.

The evidence was sufficient to establish that defendant knowingly or intentionally caused physical harm to a child. Defendant hit the victim five or six times with a belt, such that the victim’s back was covered in bruises and red marks that were still very visible the day after the incident. Defendant acknowledged that she may have hit the victim too hard. Accepting that the evidence was such that the magistrate could properly conclude that there was a reasonable doubt concerning defendant’s guilt, the magistrate erred when he improperly invaded the jury’s domain by resolving a question of fact. “Where there is credible evidence both to support and to negate the existence of an element of the crime, a factual question exists that should be left to the jury.” *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Consequently, whether the physical discipline at issue constituted reasonable discipline of a child by a parent or authorized guardian or fell within the definition of child abuse as defined by statute constituted a factual issue for the jury. *Id.* Because there was probable cause to find that defendant committed third-degree child abuse, the magistrate erred when he dismissed the charge against defendant. Accordingly, the circuit court did not err in ordering the reinstatement of the charge.

Second, defendant argues that her counsel was ineffective for failing to remove a biased juror. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. *Id.* The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel’s performance was below an objective standard of reasonableness under prevailing professional

¹ Intent, for purposes of the child abuse statute, may be inferred from the circumstances. *People v Sherman-Huffman*, 241 Mich App 264, 266-267; 615 NW2d 776 (2000).

² Defendant was the victim’s legal guardian.

norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

"A defendant tried by jury has a right to a fair and impartial jury." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). Counsel's decisions relating to the selection of jurors is generally a matter of trial strategy. *Johnson, supra* at 259.

During voir dire, the juror at issue divulged that her older sister was physically and verbally abused by their father some 16 years prior. The juror herself was never abused, but did witness the abuse of her sister. She noted, "we both overcame it, and my father and my sister are like best friends now, so --." The juror indicated that she could be fair to both sides and that her decision would be based on the evidence and the law, not on her sister's experience. Neither defendant nor the prosecution excused this juror. The juror's experience of witnessing her sister's abuse at the hands of their father does not necessitate a finding that the juror could not be impartial in a case involving child abuse. The juror pointed out that the abuse occurred 16 years earlier and she and her sister "overcame it." The juror was asked on three separate occasions whether she could be fair in light of her sister's experience and the juror responded in the affirmative. In light of the juror's candid answers to the questions surrounding abuse and her affirmation that she could remain impartial, defendant failed to overcome the presumption of impartiality and meet the burden of proving disqualification. *Johnson, supra* at 256. Further, counsel may have concluded that the juror, having witnessed true child abuse, would distinguish between abuse and overzealous discipline. Therefore, defendant's ineffective assistance of counsel claim, which is based on counsel's failure to strike the instant juror from the panel, is without merit.

Finally, defendant argues that the child abuse statute under which she was convicted, MCL 750.136b(5), is void for vagueness. We disagree.

This Court reviews vagueness challenges in light of the facts at issue. *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998). This Court is obligated to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Id.* at 593-594. A challenge to a statute's constitutionality under the void-for-vagueness doctrine is subject to de novo review. *Id.* at 594.

"To be constitutional, a contested statutory phrase must give persons of ordinary intelligence notice of the conduct that will subject them to criminal liability." *People v Gregg*, 206 Mich App 208, 211; 520 NW2d 690 (1994). A statute is not unconstitutionally vague if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or the words themselves when they

possess a common and generally accepted meaning. *People v Vronko*, 228 Mich App 649, 653; 579 NW2d 138 (1998).

Pursuant to MCL 750.136b(5), “[a] person is guilty of child abuse in the third[-]degree if the person knowingly or intentionally causes physical harm to a child.” “Physical harm’ means any injury to a child’s physical condition.” MCL 750.136b(1)(e). The child abuse statute recognizes an exception for when a parent/guardian disciplines a child, providing, “[t]his section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force.” MCL 750.136b(7).

The defendant in *Gregg* raised an argument identical to that of defendant in the instant case, asserting that the phrase “physical harm” in the child abuse statute was unconstitutionally vague. *Gregg, supra* at 209-210. The *Gregg* Court expressly rejected the defendant’s void for vagueness claim. In discussing the term “physical harm” in the context of the child abuse statute, this Court held that, “the statute clearly provides fair notice to persons of ordinary intelligence of the conduct proscribed, namely, an omission or reckless act that causes any injury to a child’s physical condition.” *Id.* at 211. The *Gregg* Court also noted that MCL 750.136b(6), the provision exempting from liability a parent/guardian who takes steps to reasonably discipline a child, is sufficient to give notice of the line between reasonable physical discipline and unlawful child abuse. *Id.* at 213. Consequently, defendant’s void for vagueness claim must be rejected.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood